IN THE MICHIGAN SUPREME COURT

Appeal from the Court of Appeals
Wilder, P.J., and Boonstra and O'Brien, JJ.

DENISHIO JOHNSON,

Plaintiff-Appellant,

v

CURT VANDERKOOI, ELLIOT BARGAS, and CITY OF GRAND RAPIDS,

Defendants-Appellees.

Court of Appeals No. 330536
Lower Court No. 14-007226-NO

KEYON HARRISON,

Plaintiff-Appellant,

v

CURT VANDERKOOI and CITY OF GRAND RAPIDS,

Defendants-Appellees.

Court of Appeals No. 330537
Lower Court No. 14-002166-NO

PLAINTIFFS' JOINT APPLICATION FOR LEAVE TO APPEAL

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Plaintiffs-Appellants Denishio Johnson (COA Docket No. 330536) and Keyon Harrison (COA Docket No. 330537) seek leave to appeal the Michigan Court of Appeals' decisions dated May 23, 2017 (Exhibits 1 and 2) affirming the trial court's separate orders of November 18, 2015 (Exhibits 3 and 4) granting the motions for summary disposition filed by Defendants-Appellees the City of Grand Rapids and several City police officers. Plaintiffs submit this joint application for leave to appeal because these cases involve similar issues, and the Court of Appeals opinion in *Harrison* explicitly adopted the reasoning of *Johnson* on many points, including those raised in this application.

For over 30 years, the City of Grand Rapids Police Department has had a standard practice of taking photographs and fingerprints of people who are not carrying identification when stopped by police, even though they are not arrested and no evidence of criminal activity is found. As the City's police chief admitted in 2015, this "picture and print" (P&P) practice was used extensively enough to cause potentially more than 2,000 people to be photographed and printed each year because they were not carrying photo ID.[1] The City could then use this information to identify and track them. The City has since supposedly relaxed its policy, purportedly now only seeking photos and fingerprints from people who act in a "highly suspicious" manner and lack ID.[2] Still, the police chief estimates that a hundred or so people who have committed no crime would continue to be photographed and printed each year.[3]

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[1] See Virginia Gordan, *Grand Rapids Modifies its Fingerprint Policy*, Michigan Radio (Dec 2, 2015) <http://michiganradio.org/post/grand-rapids-modifies-its-fingerprint-policy#stream/0> (accessed June 30, 2017), Ex 1 to Amicus Curiae's Br.

[2] *Id.*

[3] *Id.*

On separate occasions in 2011 and 2012, Denishio Johnson (Docket No. 330536) and Keyon Harrison (Docket No. 330537) were individually stopped by City police officers. During these stops, Johnson and Harrison, each an African-American minor male, cooperated with the requests of the officers, telling the officers their names and responding to the numerous questions that the police asked. During each stop, the officers found nothing to confirm their suspicions. Accordingly, when each stop concluded, the officers determined that they had no basis to further detain either Harrison or Johnson. However, in accordance with the City's long-standing policy, the officers took photos and fingerprints of both teens before releasing either of them.

In 2014, Johnson and Harrison filed separate suits against the City and the police officers involved in each stop. The cases were consolidated for discovery purposes. After discovery concluded, the trial court granted the Defendants' motions for summary disposition in both cases. Johnson and Harrison timely appealed, and oral argument in the two cases was combined.[4] On May 23, 2017, the Court of Appeals affirmed the judgments of the trial court in separate published (*Johnson*) and unpublished (*Harrison*) opinions.

The courts below erred in two main ways. First, they improperly rejected Johnson and Harrison's claims for municipal liability, even though it was undisputed that the City has for decades followed a P&P policy, and that the policy applies during field interrogations and stops like those at issue here. The Court of Appeals imposed a standard for municipal liability that hinges on whether the challenged municipal policy explicitly *requires* unconstitutional conduct, as opposed to "merely" authorizing it. This standard ignores the Supreme Court's direction that municipalities are liable for constitutional violations when the municipality gives official

[4] The Court of Appeals allowed the American Civil Liberties Union of Michigan to participate in briefing and argument as amicus curiae. Counsel from the ACLU now represent Johnson and Harrison directly in this application for leave to appeal.

sanction to specific acts, such as authorizing P&Ps during *Terry* stops. The municipal liability standard established by the Court of Appeals, if not corrected by this Court, would shield local governments from liability for countless unconstitutional acts that are explicitly authorized by municipal policy, merely because the policy does not *require* its employees to violate the Constitution. Further, because the policy at issue in this case sanctioned P&Ps during *Terry* stops, it led directly to the officers' unconstitutional actions during the individual stops.

Second, on the Fourth Amendment claims, the courts erroneously determined that the City and its officers were not liable for violating Johnson's and Harrison's constitutional rights against unreasonable searches and seizures. In doing so, the courts failed to recognize that a person's physical features give rise to a reasonable expectation of privacy, and are thus protected by the Fourth Amendment, when biometric information is obtained that would not be visible to the casual viewer. Further, the courts erred in not recognizing that the fingerprinting of Harrison and Johnson was an unreasonable search that exceeded the permissible scope of a *Terry* stop. The fingerprinting was in no way linked to officer safety. Nor can the absence of probable cause or a warrant be justified by the officers' desire to confirm the youths' stated identities, search for evidence that was irrelevant to the supposed criminal activity for which the two young men were stopped, or compile a database of fingerprints that resulted in the long-term retention of the youths' information in a government database. Finally, as to Harrison, the Court of Appeals erred in not reversing the trial court's conclusion that he consented to the P&P despite the presence of multiple material factual disputes.

The Court of Appeals, in separate two-judge opinions,[5] erred in affirming the trial court's decisions on those points, in a manner that will result in material injustice not only to the two Plaintiffs, but countless other citizens who are subjected to unconstitutional municipal policies and invasive searches and seizures. For these reasons, Johnson and Harrison respectfully request that this Court grant leave to appeal, reverse the decisions of the Court of Appeals affirming the trial court's judgments granting summary disposition for the Defendants, and remand both cases to the trial court with instructions to allow the proceedings to advance to trial.

QUESTIONS PRESENTED

1. The City of Grand Rapids has authorized its police officers to obtain fingerprints and photographs of people who are detained as part of a *Terry* stop, who are not carrying identification, and who are not arrested once the stop concludes. The City admits that its police are trained to follow that procedure during many different kinds of police/citizen encounters, including *Terry* stops, and police do in fact regularly use the procedure during such stops, including the stops of each Plaintiff. The Court of Appeals nonetheless held that the City could not be subject to municipal liability because its policy merely allowed, and did not require, its officers to employ the challenged procedure. Was the City's official policy or custom of allowing the challenged procedure during *Terry* stops a moving force behind the alleged violation of Plaintiffs' constitutional rights?

   The Trial Court did not decide this question.
   Plaintiffs-Appellants say: Yes
   Defendant-Appellee says: No
   The Court of Appeals says: No

2. Using the "picture and print" procedure, the City obtains biometric data – fingerprints – that is not readily apparent to the naked eye and is not useful for investigative or identification purposes without specialized training and equipment. The procedure takes place without probable cause and without a warrant during a *Terry* stop, is not performed to ensure officer safety, occurs after the individual has already identified himself, and proceeds despite the lack of any other evidence obtained during the stop that suggests that the individual is engaged in criminal activity. Is fingerprinting a search subject to Fourth Amendment scrutiny, and is that search unreasonable as applied in the circumstances of these two cases?

   The Trial Court says: No

[5] Judge Wilder participated in oral argument but was then appointed to the Supreme Court and did not participate in the written opinions.

Plaintiffs-Appellants say: Yes
Defendant-Appellee says: No
The Court of Appeals did not decide this question.

3. The City uses information obtained from its "picture and print" procedure to compile a database of persons so photographed and fingerprinted. Is that procedure and the indefinite retention of the data it provides an unreasonable seizure under the Fourth Amendment on the grounds that it is not strictly tied to or justified by the circumstances that purportedly made the initial seizure of the person under *Terry* permissible?

The Trial Court says: No
Plaintiffs-Appellants say: Yes
Defendant-Appellee says: No
The Court of Appeals did not decide this question.

4. The trial court granted summary disposition to the City in Docket No. 330537 on the basis that 16-year-old Harrison freely and voluntarily consented to being photographed and fingerprinted, and to having his photograph and fingerprints retained in a government database. This conclusion was based on Harrison's response of "ok" after he was told by the police that he was going to be photographed and fingerprinted. In finding that Harrison's response was not "mere acquiescence to authority," the trial court did not draw inferences in favor of Harrison, nor did it take into account Harrison's personal characteristics, particularly his age, or the evidence of duress. Did the Court of Appeals err in not reversing the grant of summary disposition?

The Trial Court says: No
Plaintiffs-Appellants say: Yes
Defendant-Appellee says: No
The Court of Appeals did not decide this question.

JURISDICTION

This is a joint application for leave to appeal after decisions by the Michigan Court of Appeals in Docket Nos. 330536 and 330537.

This Court has jurisdiction pursuant to Const 1963, art 6, §4; MCL 600.212; MCL 600.215(3); and MCR 7.303(B)(1) to review by appeal a case after a decision by the Court of Appeals.

On May 23, 2017, the Court of Appeals, in separate written decisions, affirmed the November 18, 2015 judgments of the trial court granting summary disposition against Plaintiffs

Denishio Johnson (Docket No. 330536) and Keyon Harrison (Docket No. 330537). This timely application is being filed within 42 days of the Court of Appeals' decisions. MCR 7.305(C)(2).

GROUNDS FOR GRANTING THE APPLICATION

The issues presented by this application are of significant public interest and involve legal principles of major significance to Michigan jurisprudence. MCR 7.305(B).[6] First, the proper scope of municipal liability for constitutional violations is an important substantive issue for any citizen injured by a municipality's illegal conduct. The approach taken by the Court of Appeals fails to properly address the foundational question of whether a municipal policymaker has made a meaningful and conscious choice that caused a constitutional injury. Here, the City made that choice when it adopted a policy authorizing P&P that is unconstitutional when applied to field interrogations and stops where probable cause is not present. Unless the Court of Appeals' published decision is reversed, its focus on whether a challenged policy *orders* police officers to engage in certain acts will allow municipalities throughout the state to avoid liability by explicitly authorizing but not requiring improper conduct by its officers, and thus would provide an unjustified loophole for municipalities to escape liability for constitutional injuries that they clearly caused. The fact that the City's policy reserves a "choice" to individual officers to decide whether to take a P&P in any given encounter with a citizen does not and should not shield the City from the foundational choice it made to implement the policy in the first place.

Second, as another substantive matter, these cases provide the Court with the opportunity to address an important unresolved Fourth Amendment issue. The Fourth Amendment sets probable cause and a warrant as the baseline standard for both searches and seizures. An

[6] The ways in which the Court of Appeals erred, and the material injustice caused to Johnson and Harrison as a result, are set forth in the Argument section below.

important exception to the probable cause and warrant requirements is *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), where the Supreme Court allowed police to make limited seizures upon reasonable suspicion of criminal activity and limited searches (frisks) based on reasonable belief that the individual is armed and dangerous. This appeal would allow the Court to decide the following issue: Do the justifications for an exception to the probable cause and warrant requirements that permit limited *Terry* searches and seizures also justify a systemic practice of fingerprinting and photographing individuals as part of a *Terry* stop and then retaining their information indefinitely in a government database?

Third, substantive legal issues aside, the City's "picture and print" policy raises a matter of significant public interest because it is part of a larger and disturbing trend of police practices that have consumed the nation's attention over the past several years. As detailed in several scathing U.S. Department of Justice reports, such as the DOJ's 2016 investigation of Baltimore's police, police departments nationwide are increasingly coming under scrutiny for policing tactics that infringe the rights of urban residents, many of whom are African-American.[7] Courts have become increasingly concerned about the unconstitutional expansion of *Terry* stops, and have, in high-profile class action litigation, ordered police departments to fundamentally change their use

[7] The DOJ called into question many unconstitutional aspects of the Baltimore City Police Department's practices, explaining that stops and searches are made "without the required justification," that "enforcement strategies . . . unlawfully subject African Americans to disproportionate rates of stops, searches and arrests," and that these "systemic deficiencies have "exacerbated community distrust of the police, particularly in the African-American community." US Dep't of Justice, Off of Public Affairs, *Justice Department Announces Findings of Investigation into Baltimore Police Department* (Aug 10, 2016) <https://www.justice.gov/opa/pr/justice-department-announces-findings-investigation-baltimore-police-department> (accessed June 28, 2017). Grand Rapids' "picture and print" policy has similarly strained relationships between the Grand Rapids Police Department and the City's African-American community. See Heather Walker, WOOD 8 TV, *GRPD ends standard of fingerprinting without ID* (Dec 1, 2015) <http://woodtv.com/2015/12/01/grpd-ends-routine-practice-of-taking-prints-of-people-without-i-d/> (accessed June 28, 2017), Ex 2 to Amicus Curiae's Br (describing community complaints).

of *Terry* stops to bring them within constitutional bounds.[8] Taken as a whole, these reports and cases demonstrate how some individual officers and police departments can mask discriminatory conduct under the guise of detaining a suspect on the purported grounds of reasonable suspicion.

Fourth, a common theme of these nationwide investigations into police practices is that the techniques invariably affect minority groups disproportionately. Those same concerns are present here. For example, in *Harrison*, Plaintiff provided evidence summarizing 439 incident reports from 2011 and 2012 and concluding that "75% of the officer-initiated encounters . . . involved a black subject while only 15% involved white subjects, despite the 2010 Grand Rapids census showing that the city's population was 21% black and 65% white." *Harrison*, slip op at 10-11. Preventing constitutional protections from being eroded is itself an issue of major significance to the public and Michigan jurisprudence. But the practices involved here have wider implications. Improper police practices can poison the relationships between police and the communities they are sworn to protect. In some recent instances, the continued erosion of constitutional protections has led to an eruption of long-boiling tensions that put both urban residents and dedicated police officers at increased risk.

For these reasons, this Court should grant leave to clarify the proper scope of municipal liability for constitutional violations and Fourth Amendment protections when the police seek to take photographs and fingerprints during *Terry* stops.

FACTS AND PROCEDURAL HISTORY

The City's Admitted P&P Policy

The City of Grand Rapids Police Department admits that, for over thirty years, it has had a standard practice of taking photos and fingerprints of people who are not carrying identification

[8] See, e.g., *Floyd v City of New York*, 959 F Supp 2d 540 (SDNY, 2013).

when stopped by police, even though they are not arrested and no evidence of criminal activity is found. Def/Appellee's Br on Appeal at 5 (*Johnson v Bargas*). This "custom, practice, or procedure [is] referred to as 'picture and print' or 'P&P.'" *Id.* Under this policy,

> [a] GRPD officer may take a photograph and fingerprint of an individual when the individual does not have identification on him and the officer is in the course of writing a civil infraction or appearance ticket. *A photograph and print may also be taken in the course of a citizen contact or a stop, if appropriate, based on the facts and circumstances of that incident.*

Id. (emphasis added).

The City further admits that this policy is referenced in the GRPD Field Training Manual, *id.* at 5-6, which includes "picture and print" as part of the procedures for Field Interrogation Reports. GRPD Field Training Manual, Ex 4 to Pl/Appellant's Br on Appeal, p 2 (*Harrison v VanderKooi*). The Manual identifies P&Ps as a part of stop and frisk tactics, *id.* at p 3, and Captain VanderKooi described the field interrogation procedures as instructing officers to "take a P and P, meaning photograph and print, under circumstances where you're engaged in a contact or stop or detained somebody." VanderKooi Dep 33, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). The field interrogation procedures "outline[] the guidelines for taking pictures and prints, as well as writing police reports." *Id.* Consistent with its practice of performing P&Ps, "[p]atrol sergeants are assigned a fingerprint kit and use a GRPD 'print card,'" Def/Appellee's Br on Appeal at 6 (*Harrison v VanderKooi*), and carry digital cameras with which to perform P&Ps, *id.*

The City produced incident reports associated with the fingerprints obtained in 2011 and 2012, showing that the City obtained 1,100 print cards in 2011 and 491 in 2012. Pl/Appellant's Br on Appeal at 9, Ex 13 (*Harrison v VanderKooi).* Indeed, Captain Vanderkooi admitted that he had personally engaged in at least 10 P&Ps between July 2008 and October 2011, not including

the P&Ps of Johnson and Harrison. VanderKooi Dep 67-68, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). Captain VanderKooi and Sergeant Bargas stated that the taking of both Plaintiffs' photographs and fingerprints was in keeping with departmental policy. *Id.* at 33; Bargas Dep 26, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*).

The GRPD also has a practice for what comes after such stop: completing print cards, submitting them to the patrol work box at the police station at the end of a shift to be processed by the Latent Print Unit, and filing and storing the print cards. Def/Appellee's Br on Appeal at 6 (*Harrison v VanderKooi*). Following both of the stops at issue in this case, the officers submitted the P&P cards at the end of their shifts according to these procedures. LaBrecque Dep 12-13, Ex 3 to Amicus Curiae's Br; Bargas Dep 26-27, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*).

As the City's police chief admitted in 2015, this "picture and print" (P&P) practice was used extensively enough to cause potentially more than 2,000 people to be photographed and printed each year, solely because they were not carrying photo ID.[9] The City could then use this information to identify and track them. The City has since supposedly relaxed its policy, purportedly now only seeking photos and fingerprints from people who act in a "highly suspicious" manner and lack ID.[10] Still, the police chief estimates that a hundred or so people who have committed no crime would continue to be photographed and printed each year. [11]

[9] See Gordan, *supra* n 1.

[10] *Id.*

[11] *Id.*

The City's Use of the P&P Policy on Harrison

Keyon Harrison, a 16 year old African-American high school student, was walking home from school on May 31, 2012, when he offered to help a classmate, Pablo Aguilar, carry Aguilar's toy fire truck to Aguilar's internship site. Harrison Dep 8, Ex F to Def/Appellee's Br on Appeal (*Harrison v. VanderKooi*). Harrison offered to help Aguilar because Aguilar was having a hard time riding his bike and carrying the toy fire truck at the same time. *Id.* at 13. Harrison carried the truck for Aguilar until the two had to go in different directions; he then returned the truck to Aguilar and continued walking. *Id.* at 14. As he walked home, Harrison noticed a bird in a park that appeared to have a broken wing. *Id.* at 14-15. Harrison followed the bird for a moment, and then continued on his way. *Id.* at 15.

Unbeknownst to Harrison, Captain Curt VanderKooi had observed him carrying the toy fire truck, returning it to Aguilar, and observing the bird. VanderKooi Dep 7, 10, Ex G to Def/Appellee's Br on Appeal (*Harrison v. VanderKooi*). Captain VanderKooi testified that he thought Harrison's behavior was suspicious, and stopped him. *Id.* at 13.

Harrison did not have any identification on him when he was stopped, but he provided his name to Captain VanderKooi. *Id.* at 65. Further, Harrison explained to Captain VanderKooi that he was helping his friend, Pablo Aguilar, carry an internship project and trying to catch or help birds. Harrison Dep 17, App F to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*); VanderKooi Dep 13-14, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*); Nagtzaam Dep 15, Ex 5 to Amicus Curiae's Br; Newton Dep 11, Ex 6 to Amicus Curiae's Br. Captain VanderKooi asked for Harrison's consent to search his backpack, VanderKooi Dep 20, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*), and Harrison agreed, Harrison Dep 27, App F to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). Captain VanderKooi found that his backpack contained only school materials. VanderKooi Dep 20, App G to

Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). Another officer questioned Pablo Aguilar, and Aguilar's story corroborated Harrison's story. Newton Dep 16, Ex 5 to Amicus Curiae's Br. Captain VanderKooi concluded that there was no probable cause to arrest Harrison, and allowed him to leave. VanderKooi Dep 25, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*).

Before Captain VanderKooi allowed Harrison to leave, he told Harrison that to "identify who I am he would have to take my picture." Harrison Dep 30-31, App F to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). Harrison asked, "did I do something illegal," *id.*, and Captain VanderKooi told Harrison that the picture "was just to make sure that I was who I say I am," *id.*, and Harrison said "okay," *id.* Similarly, Captain VanderKooi told Harrison that "we need to take your fingerprints," and Harrison asked why. *Id.* at 34. Captain VanderKooi "said, this is just to clarify again to make sure you are who you say you are," *id.* and Harrison said "okay," *id.*

At Captain VanderKooi's direction, Sergeant Stephen LaBrecque took Harrison's photo and thumbprint, LaBrecque Dep 8, Ex 3 to Amicus Curiae's Br, using "a department issued thumb print card for just this type of P and P that lists some information as an open space for the thumb print," *id.* LaBrecque then attached the photograph to the electronic copy of the incident report. *Id.* at 10. The incident report was uploaded to the central police computer at the end of LaBrecque's shift. *Id.* at 11-12. Similarly, LaBrecque held the print card until the end of his shift, and submitted it to the workbox for processing at the end of his shift. *Id.* at 13-14. The City continues to maintain Harrison's photograph and print in its files. Def/Appellee's Br on Appeal at 5 (*Harrison v VanderKooi*).

Harrison later had to fend off his schoolmates' questions about why he'd been stopped; he believes that a bus drove by and someone on the bus from school saw him. Rumors soon spread at school that he was involved in drugs, a robbery, or had even shot someone. See Harrison Dep 57-58, App F to Def-Appellee's Br on Appeal (*Harrison v VanderKooi*).

The City's Use of the P&P Policy on Johnson

Denishio Johnson, a 15 year old African American male, was walking through an athletic club parking lot on his way to wait for a friend to arrive on the bus. Johnson Dep 7-8, App F to Def-Appellee's Br on Appeal (*Johnson v Bargas*). As he walked through the parking lot, Johnson looked at himself in the reflection of the car windows. *Id.* at 11. There had been earlier break-ins in the lot, and after an athletic club employee observed Johnson walking through the parking lot, appearing to be looking into cars, the employee called the police. Bargas Dep 4-5, App G to Def-Appellee's Br on Appeal (*Johnson v Bargas*).

After he walked through the parking lot, Johnson waited for the bus at a street corner in front of a Denny's restaurant, on the same side of the street as the athletic club and across the street from a bus stop. Johnson Dep 6-7 App F to Def-Appellee's Br on Appeal (*Johnson v Bargas*). When Johnson was stopped by police, Bargas Dep 7, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*), Johnson explained that he lived nearby and was using the lot as a shortcut, Def's Resp to Johnson's First Set of Interrogatories ¶ 4, Ex 4 to Amicus Curiae's Br, and that he did not try to enter into or access any of the vehicles in the lot. Bargas Dep 24, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*).

Johnson did not have identification, Johnson Dep 9, App F to Def-Appellee's Br on Appeal (*Johnson v Bargas*), but provided his name, address, and birthdate, Bargas Dep 10-11, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*), and one of the officers present

confirmed that he had no outstanding warrants or previous arrests. Incident Report, Ex 6 to Pl/Appellant's Br on Appeal.

An officer photographed Johnson and took a full set of his fingerprints, Johnson Dep 17, App F to Def-Appellee's Br on Appeal (*Johnson v Bargas*); Johnson was then handcuffed and placed in the back of a police car, *id.* at 15. After his mother identified him, Johnson was allowed to leave with her, *id.* at 16.

The police had nothing that connected Johnson to the earlier break-ins, as there were no suspect descriptions from some of the prior larcenies to which Johnson's appearance could be compared, VanderKooi Dep 62, App G to Def/Appellee's Br on Appeal (*Harrison v Vanderkooi*), and Johnson did not match the description of a "black male that was bald wearing a hood" in two other incidents, *id.* at 12-13.

Nevertheless, Sergeant Bargas took photographs of Johnson not only for identification purposes, but also because he considered Johnson a suspect in previous burglaries in the lot. Bargas Dep 24-25, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*). Similarly, Captain VanderKooi testified that he believed Johnson's fingerprints should be compared to those from earlier larcenies at the MAC because "[h]e was walking through the [the athletic club parking lot] . . . looking into cars." VanderKooi Dep 60, App G to Def/Appellee's Br on Appeal (*Harrison v Vanderkooi*).

Johnson's photographs and fingerprints were not submitted or processed immediately. Instead, Sergeant Bargas gave them to another officer to submit at the end of the other officer's shift, and the prints were not actually processed until some indeterminate time after that. Def/Appellee's Br on Appeal at 5 (*Johnson v Bargas*).

Johnson's and Harrison's prints and photos, like those of all other people whose information has been collected by the City, will apparently remain on file for as long as the City deems it necessary: "[t]he fingerprints and photos that have already been taken will not be purged from the department's databases at this time. What will happen to them in the long term has not yet been determined."[12]

The Trial Court's Grant of Summary Disposition

In 2014, Johnson and Harrison filed separate suits against the City and the police officers involved in each stop. The cases were consolidated for discovery purposes, and the parties moved for summary disposition. In Johnson's case, the trial court found that "Plaintiff was in public and had no reasonable expectation of privacy in his various physical features which were readily observable by the public. Therefore, Bargas did not violate Plaintiff's Fourth Amendment rights when he executed the P&P." Ex 3, p 6. Moreover, the court found that "[e]ven if the P&P was a search and seizure under the Fourth Amendment . . . Bargas's actions were reasonable under the circumstances." *Id.* at 6-7.

In Harrison's case, the trial court denied summary disposition to Harrison because it found that the stop was reasonable and not of excessive duration. Ex 4, p 7. The court also found that Captain VanderKooi obtained Harrison's consent to perform a P&P. *Id.* at 11.

In both cases, because the court found no constitutional violation, it granted the City's motion for summary disposition as to municipal liability. Ex 3, p 12; Ex 4, p 18.

The Court of Appeals' Affirmance

Johnson and Harrison timely appealed, and oral argument in the two cases was combined. On May 23, 2017, the Court of Appeals affirmed the trial court in separate published (*Johnson*)

[12] Walker, *supra* n 7.

and unpublished (*Harrison*) opinions. In *Johnson*, the Court of Appeals found that the individual officers were entitled to qualified immunity because "[i]t is not clearly established that fingerprinting and photographing someone during . . . an investigatory stop violates the Fourth Amendment." *Johnson*, slip op at 14. Nevertheless, the Court of Appeals noted in dicta that "prior statements from the United States Supreme Court and this Court suggest that such a procedure would be permissible under the Fourth Amendment if the initial stop was justified by a reasonable suspicion." *Id.* As to municipal liability, the Court of Appeals held that the Plaintiff failed to show that any constitutional violation was caused by an official municipal policy or custom. *Id.* at 18. In so ruling, the Court of Appeals relied on the City's claim that a "P&P is discretionary and dependent on the particular facts of the incident in question." *Id.* at 19. The Court of Appeals adopted this reasoning in *Harrison*, slip op at 5, 11, and found that the stop of Harrison was not of unreasonable duration, *id.* at 7-8.

Johnson and Harrison now seek leave to appeal.

STANDARD OF REVIEW

"This Court reviews de novo both questions of constitutional law and a trial court's decision on a motion for summary disposition." *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 183; 880 NW2d 765 (2016). "A court reviewing a motion under MCR 2.116(C)(10) must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party." *White v Taylor Distrib Co, Inc*, 482 Mich 136, 139; 753 NW2d 591 (2008) (internal quotation marks omitted).

ARGUMENT

I. Because the City of Grand Rapids Has a Policy, Practice or Custom of Fingerprinting and Photographing Individuals During *Terry* Stops, the Court of Appeals Improperly Affirmed the Grant of Summary Disposition on Plaintiffs' Claims for Municipal Liability.

The City has admitted that the GRPD has a policy of fingerprinting and photographing individuals during many different kinds of police/citizen encounters, including *Terry* stops like those involved in these two cases. As a result, it is liable under 42 USC 1983 for violations of Harrison's and Johnson's Fourth Amendment rights. Courts assess municipal liability using a two-part test: (1) whether a plaintiff's constitutional rights were violated and (2) if so, whether the municipality was responsible for those violations. *Cash v Hamilton Co Dep't of Adult Probation*, 388 F3d 539, 542 (CA 6, 2004). Here, the Court of Appeals affirmed summary disposition for the City based solely on the second issue, specifically on the grounds that any deprivation of the Plaintiffs' constitutional rights was not the result of an official City policy or custom. *Johnson*, slip op at 19.[13] In doing so, the Court of Appeals erred in focusing on the fact that the policy does not explicitly *require* officers to take P&Ps every time they conduct a field interrogation or *Terry* stop. But that is not the legal standard for municipal liability under 42 USC 1983. Municipal liability for constitutional violations hinges on whether a municipality is responsible for those violations as a result of having authorized the conduct in question; it does not depend on whether an individual officer acting pursuant to that authority retains some level of discretion in deciding whether or not to engage in that conduct in a particular situation. As a result of adopting this erroneous approach, the Court of Appeals erred in holding that the City is not responsible for the violations of the Plaintiffs' constitutional rights.

[13] *Harrison* adopted the reasoning of *Johnson* on the municipal liability issue, and as a result affirmed the City's motion for summary disposition in that case. *Harrison*, slip op at 11.

A. The Record Demonstrates that the City has an Official Policy or Custom of Authorizing the P&P Procedure During Police/Citizen Encounters, Including *Terry* Stops, and that this Official Policy or Custom has Been in Place for Decades.

Under *Monell v Department of Human Services*, 436 US 658, 691; 98 S Ct 2018; 56 L Ed 2d 611 (1978), municipalities are liable where "action pursuant to official municipal policy of some nature caused a constitutional tort." Accordingly, responsibility can be established through written policies, customs, or practices. *Id.* at 690-91. Here, more than enough evidence existed to establish that such a policy existed. Most significantly, the City itself admitted that the GRPD engages in a "custom, practice, or procedure" of taking "[a] photograph and print . . . in the course of a citizen contact or a stop." Def/Appellee's Br on Appeal at 5 (*Johnson v Bargas*).

An "official policy" exists where there are "formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur v City of Cincinnati*, 475 US 469, 480-81; 106 S Ct 1292; 89 L Ed 2d 452 (1986). For example, the *Monell* plaintiffs challenged agency rules requiring pregnant employees to take unpaid leaves of absence. The Court held that these agency actions "unquestionably involve[] official policy." 436 US at 694. Similarly, the Sixth Circuit held that it was "clear that the defendants had a policy authorizing use of deadly force" where the police department had a written order on the matter and officers were trained to use such force. *Garner v Memphis Police Dep't*, 8 F3d 358, 364-66 (CA 6, 1993). Official policy also includes a "longstanding practice or custom which constitutes the standard operating procedure of the local government entity." *Jett v Dallas Indep Sch Dist*, 491 US 701, 737; 109 S Ct 2702; 105 L Ed 2d 598 (1989). Thus, municipalities are liable for "constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." *Monell*, 436 US at 690-91.

In this case, the undisputed evidence shows that the use of P&Ps in connection with *Terry* stops is "standard operating procedure," *Jett*, 491 US at 737, and that "the municipality has officially sanctioned or ordered" the P&P practice, *Pembaur*, 475 US at 480. Indeed, the City admitted that the GRPD "has developed a custom, practice, or procedure referred to as 'picture and print' or 'P&P,'" Def/Appellee's Br on Appeal at 5 (*Johnson v Bargas*), and that this practice has been in use "for over thirty years," *id.* Under this policy,

> [a] GRPD officer may take a photograph and fingerprint of an individual when the individual does not have identification on him and the officer is in the course of writing a civil infraction or appearance ticket. *A photograph and print may also be taken in the course of a citizen contact or a stop, if appropriate, based on the facts and circumstances of that incident.*

Id. (emphasis added). As this excerpt shows, the reference to "citizen contact or stop" is in contrast to taking P&Ps in the context of an arrest, issuing a civil infraction or appearance ticket, or other types of situations not directly at issue here. The Court of Appeals appeared to emphasize all of these other situations where the City's police can take P&Ps, taking note of some of the differences between those situations and the *Terry* stops at issue here. *Johnson*, slip op at 19. Plaintiffs don't take issue with the Court of Appeals' characterization of those differences, but those differences are immaterial. The City has a clear policy of allowing P&Ps when writing a civil infraction, for example, but that policy is not at issue in this case. Instead, the reversible error in the Court of Appeals' reasoning is its failure to acknowledge that the City by its own admission has an equally clear policy of allowing P&Ps during field interrogations or stops.

The City's admitted practice of performing P&Ps during *Terry* stops is further reinforced by the record evidence that shows that the GRPD also has a practice for what comes after such stops: completing print cards, submitting them to the patrol work box at the police station at the

end of a shift to be processed by the Latent Print Unit, and filing and storing the print cards. Def/Appellee's Br on Appeal at 6 (*Harrison v VanderKooi*). The officers in both *Harrison* and *Johnson* followed these procedures when submitting the P&P cards at the end of their shifts. LaBrecque Dep 12-13, Ex 3 to Amicus Curiae's Br; Def/Appellee's Br on Appeal at 5 (*Johnson v Bargas*). These were not isolated occurrences: the City produced incident reports associated with the fingerprints obtained in 2011 and 2012, showing that the City obtained 1,100 print cards in 2011 and 491 in 2012. Def/Appellee's Br on Appeal at 6 (*Harrison v VanderKooi*). As the City's police chief admitted in 2015, this practice was used extensively enough to potentially lead to over 2,000 people being asked each year, solely because they were not carrying photo ID, to submit to photographing and fingerprinting when stopped by police.[14]

Finally, the record is replete with official GRPD documents that tie the P&P procedure to field interrogations and stops. For example, the City admits that this policy is referenced in the GRPD Field Training Manual, Def/Appellee's Br on Appeal at 5-6 (*Johnson v Bargas*), which includes "picture and print" as part of the procedures for Field Interrogation Reports. GRPD Field Training Manual, p 2, Ex 4 to Pl/Appellant's Br on Appeal (*Harrison v VanderKooi*). Even more significantly, the Manual identifies P&P as a part of stop and frisk tactics. *Id.* at p 3. Indeed, Captain VanderKooi described the field interrogation procedures as instructing officers to "take a P and P, meaning photograph and print, under circumstances where you're engaged in a contact or stop or detained somebody." VanderKooi Dep 33, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). Further, "in [the field interrogation procedures,] it outlines the guidelines for taking pictures and prints, as well as writing police reports." *Id.* Taken together, this evidence at a minimum raises a genuine question that the City's authorization of the P&P

[14] Gordan, *supra* n 1.

procedure was intended to and did establish a fixed plan of action to be followed consistently and over time by police officers. See *Pembaur*, 475 US at 480-81.

In sum, the City's admission, coupled with the overwhelming record evidence, demonstrates that the City has an official custom or policy, for municipal liability purposes, of allowing P&Ps during *Terry* stops.

B. A Policy That Gives Police Officers Discretion to Engage in Unconstitutional Conduct is Sufficient to Establish Municipal Liability Under *Monell*.

The Court of Appeals based its erroneous decision that the City was not liable for its policy or custom on the fact that the challenged P&P policy did not *require* police officers to conduct P&Ps during field interrogations and stops. The Court of Appeals' misplaced emphasis on whether the policy was mandatory or only discretionary is shown most clearly in the following discussion:

> We therefore conclude that plaintiff failed to raise a genuine issue of material fact concerning whether Bargas's action was taken "under color of some official policy" whether written or unwritten, when the most that can be gleaned from the evidence presented to the trial court was that the P&P procedure was *available for use by GRPD officers and could, depending on particularized circumstances*, be used during the field interrogation of a person who was never arrested or charged with a crime.

Johnson, slip op at 20 (emphasis added). This is far from the only such example of improper reliance on whether the City required its officers to conduct P&Ps in all *Terry* stops, however. Similar instances appear at other key junctures in *Johnson*, as shown by the following representative examples:

- "However, the documentation relied upon by plaintiff does not indicate that the city has a policy of *requiring* P&Ps during field interrogations and stops." *Id.* at 19 (emphasis added in this and all other quotations in this list and accompanying footnote).

- "Nothing about these references *instruct* GRPD officers to take P&Ps *during every field interrogation or stop or every such encounter* where the subject lacks official identification or to P&P 'innocent citizens.'" *Id.*

- "Vanderkooi's testimony similarly reveals his *individualized choices* to perform P&Ps or to order them performed . . . ." *Id.*

- "In this case . . . plaintiff cannot show that the City '*specifically directed*' Bargas to violate plaintiff's rights." *Id.*[15]

This reasoning misapplies the law of municipal liability for unconstitutional acts of police officers or other municipal employees and agents, and imposes new and significant burdens on citizens challenging that sort of conduct. Plaintiffs must demonstrate a causal relationship between the City's policy and the use of the P&P procedure against them—in other words, that the policy was a "moving force" behind the violation of their constitutional rights. See *Garner*, 8 F3d at 364-65. Nothing in *Monell* or other decisions of this Court or the U.S. Supreme Court allows a local government to shield itself from liability simply by couching its official directives to its employees in non-mandatory terms. Doing so would ignore the primary focus of *Monell* on "responsibility," under which the "'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur*, 475 US at 478, 479. Here, the "act" of the City giving rise to liability was its implementation of a policy allowing its officers to take P&Ps during *Terry* stops. As *Pembaur*

[15] See also *id.* at 19 (The "city also stated that a P&P was *discretionary and dependent on the particular facts of the incident in question*: 'A photograph or print might be taken in the course of a field interrogation or stop *if appropriate based on the facts and circumstances of that incident.*"); *id* at 19-20 (describing Officer Bargas's testimony that he decided to P&P Harrison "*based on the particular circumstances of the case*"); *id.* at 20 ("Nothing in Bargas's testimony indicates that he was following a custom or policy *that had the force of law* when he performed a P&P on plaintiff.").

explains, liability flows not only when a local government orders its employees to engage in conduct, but also when it officially *sanctions* that conduct. *Id.* at 480 ("*Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality'—that is, acts which the municipality has officially sanctioned ***or*** ordered." (emphasis added)). By authorizing P&Ps in field interrogations and other citizen contacts and stops, the City officially sanctioned precisely that conduct. Under *Monell* and *Pembaur*, that establishes the existence of an official policy or custom.

This common-sense point is illustrated by the results and reasoning of several cases. For example, in *Garner*, the challenged municipal policy "allowed the use of deadly force in cases of burglary." 8 F3d at 361. If all other reasonable means of apprehension had been tried and failed, police officers were "authorized" to use deadly force "when necessary to apprehend a fleeing burglary suspect." *Id.* at 364. The existence of this policy, and the fact that the police department had taught the officer that "it was proper" to shoot a fleeing suspect if needed to prevent escape, was enough to establish the necessary "moving force" causal connection between the policy and the injury that occurred when an officer shot and killed a fleeing 15-year-old unarmed boy. *Id.* at 360, 364-65. See also *Stevens-Rucker* v *City of Columbus*, __ F Supp 3d __, 2017 WL 1021346, slip op at 16 (SD Ohio, March 16, 2017) (denying city's motion for summary judgment on municipal liability where the policy at issue authorized police officers to use deadly force against a suspect on the ground with a knife, regardless of the distance between the officer and the suspect, so long as the officer felt threatened). The city's policy in *Garner*, like the unconstitutional state law it implemented, did not *require* police officers to use deadly force, and of course the city policymakers who adopted the unconstitutional policy did not personally instruct an officer to shoot the plaintiff's son. The city was nonetheless liable because it "had a

policy authorizing use of deadly force" pursuant to an unconstitutional state statute, just as the City here had a policy authorizing P&P in field interrogation and *Terry* stops.

Because the Court of Appeals' decision is published, it is now binding precedent throughout the state. Unless it is reversed, municipalities throughout the state will be able to evade liability for policies that cause constitutional violations whenever they authorize, but don't require, officers or other municipal officials to engage in the unconstitutional conduct. For example, it would make a mockery of constitutional protections if a city could implement a policy "authorizing" police to shoot an unarmed fleeing suspect in the back, but avoid liability on the basis that officers aren't required to do so.

Here, the City's policy allows officers to engage in P&Ps during routine investigative stops absent probable cause, where the citizens are not arrested. As discussed below in Section II, this practice is unconstitutional under the U.S. Supreme Court's *Terry* jurisprudence. Even a single instance of unconstitutional conduct can subject a municipality to liability when authorized by official municipal policy. *Pembaur*, 475 US at 481 ("[W]here action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly."). As shown above, the record shows multiple instances of such conduct; Captain Vanderkooi personally engaged in at least 10 P&Ps from 2008 through 2013 where the citizen whose prints and photos were taken were innocent of any wrongdoing, not including the P&Ps of Johnson and Harrison. VanderKooi Dep 67-68, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). There can be little doubt that the individual officers' conduct in this case was not something they undertook solely on their own initiative; they were following the procedure and custom of the City itself. Therefore, the

challenged P&P incidents are acts for which the "government as an entity is responsible under § 1983." *Monell*, 436 US at 694.

In sum, the GRPD's practice of obtaining photographs and fingerprints during *Terry* stops is an "official municipal policy" for which it bears responsibility under *Monell*, and which served as the "moving force" behind the deprivation of Johnson's and Harrison's constitutional rights. Therefore, the trial court erred in granted summary disposition as to municipal liability, and the Court of Appeals erred in affirming the trial court's judgment.

II. The P&P Procedure Violated Johnson and Harrison's Fourth Amendment Rights.

Leave should also be granted to clarify that taking fingerprints without consent is a Fourth Amendment search, and thus unconstitutional when performed as part of a *Terry* stop without probable cause. Because the Court of Appeals in both cases ruled that the P&P was not the result of a City policy or custom, and additionally granted qualified immunity to the individual officers by deciding that the constitutional rights at issue were not "clearly established," it did not squarely decide the underlying question whether Plaintiffs' constitutional rights had actually been infringed as a result of the P&P procedure. As described in Section I, however, the Court of Appeals erred in affirming the trial court on the "policy or custom" issue. Therefore, if leave is granted, this Court must decide whether to address the underlying merits of the Plaintiffs' constitutional claims or remand the case for the Court of Appeals to address the issue in the first instance.

This Court should grant leave on the Fourth Amendment merits question because, although the Court of Appeals did not squarely reach it, its dicta strongly suggests that it would have adopted an erroneous approach to whether fingerprinting is subject to Fourth Amendment scrutiny. Because *Johnson* is a published opinion, and the Court of Appeals' discussion of this

issue is likely to mislead subsequent litigants and courts about how the Fourth Amendment applies to these types of fingerprinting procedures when used during *Terry* stops, this Court should grant leave to address this issue.

Further, the Court of Appeals in *Harrison* erred in deciding that the police officers did not detain him for longer than permitted for a *Terry* stop.[16] In reaching this erroneous conclusion, the Court of Appeals focused only on the length of the stop, and failed to address another critical component for assessing a *Terry* stop's reasonableness: the *scope* of the stop. Once Harrison told the police his name, the police were not justified in forcing him to take additional steps to prove his identity, such as requiring him to allow his photo and prints to be taken. Finally, the Court of Appeals in *Harrison* did not explicitly address his argument that he did not consent to the P&P procedure.[17] The trial court did, however, and erroneously concluded that he had consented despite the presence of significant factual issues about what Harrison and the police officers had said, and the meaning of his statements.

As shown below, granting summary disposition against Johnson and Harrison on these Fourth Amendment issues was legal error and should be reversed.

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[16] The Court of Appeals did not squarely address this issue in *Johnson*. Instead, that opinion limited its review of Johnson's Fourth Amendment claims to those arising out of the P&P procedure, and refused to address his arguments challenging other aspects of the stop, such as the reasonableness of the initial stop, the stop's duration, or whether he should have been handcuffed because it found that those claims were not adequately pled in Johnson's complaint. *Johnson*, slip op at 8, 10, 12. Johnson does not challenge that ruling in this Application. As discussed below, however, whether the P&P exceeded the permissible *scope* of a *Terry* stop remains at issue in both *Johnson* and *Harrison*.

[17] Consent is not at issue in *Johnson*. Officers did not ask for permission to photograph and fingerprint Johnson. Def/Appellee's Br on Appeal at 4 (*Johnson v Bargas*); Johnson Dep 17, App F to Def/Appellee's Br on Appeal.

A. Fingerprinting is a Search Under the Fourth Amendment Because There is a Reasonable Expectation of Privacy in One's Fingerprints.

Johnson's and Harrison's claim that fingerprinting them violated the Fourth Amendment's protection against unreasonable searches hinges upon their reasonable expectation of privacy in their fingerprints. The applicability of the Fourth Amendment to Johnson's and Harrison's claims first depends on "whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v Maryland*, 442 US 735, 740; 99 S Ct 2577; 61 L Ed 2d 220 (1979). Here, as a matter of law, they did have a reasonable expectation of privacy in their fingerprints.

1. The Supreme Court Has Never Decided Whether Fingerprinting is a Search Under the Fourth Amendment.

"[W]hether obtaining evidence of an individual's personal characteristics in certain ways constitutes a Fourth Amendment search [] will be of central importance only in rather unusual circumstances." 1 LaFave, Search & Seizure: A Treatise on the Fourth Amendment (5th ed.), § 2.6(a), ¶ 2. This case poses exactly those circumstances. "Although it is well established that the taking of fingerprints is permissible incident to a lawful arrest, courts have rarely addressed the question of whether the act of fingerprinting is itself a search." *Id.* Michigan courts have never decided the issue.[18] Nor has the Supreme Court ever done so. *Maryland v King*, __ US __, __; 133 S Ct 1958, 1987; 186 L Ed 2d 1 (2013) (SCALIA, J, dissenting)). Thus, in this limited respect,

[18] *Johnson* erroneously states that a 1990 Court of Appeals opinion "held that '[t]here is no reasonable expectation of privacy in one's fingerprints.'" *Johnson*, slip op at 14 (citing *Nuriel* v *Young Women's Christian Ass'n of Metro Detroit*, 186 Mich App 141, 146; 463 NW2d 206 (1990)). The quoted statement is dicta, not a holding. The *Nuriel* court did not have to decide the Fourth Amendment question, instead deciding to uphold the trial court's denial of a motion to compel taking fingerprints in a civil case because a discovery stipulation between the parties precluded the movant from obtaining such information. See *id.* at 146-47.

the Plaintiffs agree with the Court of Appeals that whether fingerprinting is a Fourth Amendment search has not been "definitively" decided. See *Johnson*, slip op at 14.

2. The Supreme Court's Jurisprudence Governing Searches Shows that Harrison and Johnson had a Reasonable Expectation of Privacy in their Fingerprints.

In light of the Court's controlling principles governing searches of a person's physical characteristics, however, the best reading of the Court's cases touching on fingerprints is that Harrison and Johnson had a reasonable expectation of privacy in their fingerprints. Thus, the trial court erred in concluding that the fingerprinting is not a search. Ex 3, p 6. Further, the Court of Appeals erred to the extent that it appears to conclude that fingerprinting during a *Terry* stop is permissible so long as the police had reasonable suspicion to initiate the stop. See *Johnson*, slip op at 14 ("In fact, prior statements from the United States Supreme Court and this Court suggest that such a procedure would be permissible under the Fourth Amendment if the initial stop was justified by a reasonable suspicion.") Neither Michigan nor Supreme Court caselaw supports such a conclusion.

First, the Supreme Court has concluded on numerous occasions that obtaining a criminal suspect's physical characteristics is a Fourth Amendment search. "Virtually any intrusion into the human body will work an invasion of cherished personal security that is subject to constitutional scrutiny" – even if doing so involves only a "light touch" as in the case of DNA swabs. *King*, __ US at __; 133 S Ct at 1969 (opinion of the Court) (citations, brackets, and quotation marks omitted). Indeed, even scraping an arrestee's fingernails to obtain trace evidence is a search. See *Cupp v Murphy*, 412 US 291; 93 S Ct 2000, 36 L Ed 2d 900 (1973).

Second, fingerprints cannot be interpreted with the naked eye, which should be dispositive in determining that fingerprinting is a search. In concluding that some physical characteristics that do not require bodily intrusion (like voice exemplars or handwriting) are not

protected by the Fourth Amendment, the Court has emphasized whether the characteristics can be viewed as something that the person "knowingly exposes to the public, even in his home or office." *United States v Dionisio*, 410 US 1, 14; 93 S Ct 764; 35 L Ed 2d 67 (1973) (voice exemplars). For example, "[n]o person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world." *Id.*

That analysis does not apply to a person's fingerprints. A person's hands, as a physical feature, are certainly exposed to the world. But the biometric information contained in his fingerprints is not. Instead, that information can only be revealed if subjected to elaborate procedures and analysis that most people that a person encounters in day-to-day interactions are unable to perform. That distinction makes all the difference, as LaFave suggests in his Search and Seizure treatise:

> Assume . . . that a person is subpoenaed to appear before a grand jury and to supply samples of the hair on his head . . . [to] be compared with hairs found at a crime scene. Does the person subpoenaed have a legitimate claim that the taking of hair samples is governed by the Fourth Amendment . . . ? . . . In [one] respect, the situation is like that in *Dionisio*, but in other respects it is not. . . . *[W]hile the hair is "constantly exposed" in the sense that the person knowingly exposes the color and style of his hair, it cannot really be said that the hair is exposed in the sense of revealing those characteristics that can be determined only by microscopic examination*.

LaFave, § 2.6(a) (emphasis added). LaFave further explains why this distinction is so crucial, looking to *Cupp v Murphy*. A person walking into a police station "with evidence on his hands in plain view . . . nonetheless has a protected expectation of privacy with respect to that evidence

when its incriminating character is not evident to the naked eye and it must be seized and then subjected to microscopic analysis to be of evidentiary value." *Id.*[19]

Fingerprints are similar. They can, of course, be used in special circumstances to identify people. But using them in that way requires time and training and equipment. It is not something that people can do quickly, with the naked eye. As a result, people such as Johnson and Harrison, as well as anyone else subject to the City's P&P policy, have a reasonable expectation of privacy in their fingerprints. Absent special circumstances, people reasonably expect that other people they encounter in daily interactions will not be able to obtain any biometric information from their fingers. This alone shows that when the City and its police officers take fingerprints, they are performing a search, and cannot do so without complying with the Fourth Amendment.

Finally, unlike the voice exemplars in *Dionisio*, the fingerprinting to which Johnson and Harrison were subjected pursuant to the City's P&P policy impacted their "interests in human dignity and privacy" and involved a "severe, though brief, intrusion upon cherished personal security . . . [that was] surely . . . an annoying, frightening, and perhaps humiliating experience." See 410 US at 14-15 (citing *Schmerber v California*, 384 US 757, 769-70; 86 S Ct 1826; 16 L Ed 2d 908 (1966); *Terry*, 392 US at 24-25). The fingerprinting of Johnson and Harrison occurred in public, adjacent to a busy street or a busy workout facility. Anyone observing that sort of interaction from a distance is likely to be able to determine exactly what is occurring.

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[19] In other contexts, the Supreme Court has similarly been sensitive to the implications of police using technology to obtain information that humans cannot see without assistance. See *Kyllo v United States*, 533 US 27, 34–35; 121 S Ct 2038; 150 L Ed 2d 94 (2001) (internal quotations and citations omitted) ("[O]btaining by sense-enhancing technology any information regarding the interior of a home" – infrared radiation that was not visible to the naked eye – "that could not otherwise have been obtained without physical intrusion into a constitutionally protected area [] constitutes a search—at least where . . . the technology in question is not in general public use."). A person's body, like a home, is a "constitutionally protected area," government intrusions on which are subject to heightened scrutiny.

In that way, the embarrassment suffered by Johnson and Harrison – or anyone else – in being publicly fingerprinted is not far removed from the reaction that someone subject to a frisk as part of a *Terry* stop is likely to experience:

> [I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment.

United States v Askew, 529 F3d 1119, 1127 (DC Cir, 2010) (quoting *Terry*, 392 US at 16-17). Fingerprinting may sometimes need to occur in a public setting, as does a *Terry* frisk for weapons. But any decision about whether people should be forced to endure such procedures cannot be dodged on the grounds that the fingerprinting procedure is not itself a search.

3. Supreme Court Dicta Should Not Be Misread to Shield Fingerprinting from Fourth Amendment Protection.

Dicta in some Supreme Court cases about fingerprinting should not be read to exempt fingerprinting from Fourth Amendment review. Those cases hold only that transporting detainees before obtaining their fingerprints can violate the Fourth Amendment if appropriate protections are not provided. For example, the Court has invalidated the stationhouse detention and fingerprinting of various suspects who were seized in a police dragnet. *Davis v Mississippi*, 394 US 721; 89 S Ct 1394; 22 L Ed 2d 676 (1969). Relying on *Davis*, the Court later held that absent probable cause or prior judicial authorization, transporting a burglary-rape suspect to the stationhouse before fingerprinting him was an improper seizure. See *Hayes v Florida*, 470 US 811; 105 S Ct 1643; 84 L Ed 2d 705 (1985).

In neither of these cases did the Court have occasion to determine whether fingerprinting on the street as part of a *Terry* stop was permissible in the absence of probable cause. In dicta, the *Davis* Court suggested that detentions for fingerprinting might be found to comply with the Fourth Amendment in "narrowly defined circumstances" even absent probable cause. 394 US at

727. *Hayes*, in turn, suggested that it was not clear whether a "brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause, is necessarily impermissible under the Fourth Amendment." 470 US at 816. In both cases, the analysis implicitly assumes that a search and seizure is involved; the question is simply whether the circumstances, however they are "narrowly defined," reasonably justify that search.

Finally, *Dionisio*, which held only that voice exemplars were not a search, cited to the *Davis* dicta to support its reasoning. *Dionisio*, 410 US at 15 (citing *Davis*, 394 US at 727). But *Hayes*, decided a decade after *Dionisio*, does not cite to *Dionisio* anywhere in the opinion, including the fingerprinting dicta. See *Hayes*, 470 US 811. This is perhaps because the Court had come to recognize that although fingerprinting might not always involve probing into an individual's private life and thoughts, that doesn't mean that a person lacks a reasonable expectation of privacy in the information that fingerprints do reveal. In fact, *Hayes* read the *Davis* dicta to say only that fingerprinting does not involve the probing into private life and thoughts that "often marks" an interrogation or search, which of course means that such probing is not required for a search to occur. See *Hayes*, 470 US at 814. As *Hayes* suggests, the intrusion that fingerprinting imposes may well be "less serious than other types of searches and detentions," *id.*, but that presumes that fingerprinting is in fact a search.

The Court in the 30 years since *Hayes* has never moved to convert its dicta into a holding. But the Court of Appeals appeared to erroneously rely on this limited dicta to read more into *Davis*, *Hayes*, and other cases than is actually there. See *Johnson*, slip op at 14.[20] In doing so, the

[20] The federal cases cited in *Johnson*, slip op at 14, either erroneously overstate the Supreme Court's dicta or did not actually decide whether fingerprinting was a search. See *United States v Farias-Gonzalez*, 556 F3d 1181, 1188 (CA 11, 2009) (erroneously stating that the court held in *Dionisio* that fingerprinting was not a search, when the cited statement in *Dionisio* was dicta because that case only involved voice exemplars); *Rowe v Burton*, 884 F

Court of Appeals improperly rejected the principles announced in various Fourth Amendment opinions demonstrating that individuals do have a reasonable expectation of privacy in their fingerprints. Accordingly, the City's fingerprinting procedures subjected Johnson and Harrison to a Fourth Amendment search.

B. Fingerprinting During a *Terry* Stop Exceeds the Permissible Scope of Such Stops When It Is Not Necessary for Officer Safety and There Is Neither Probable Cause Nor a Warrant to Search for Biometric Information.

The officers performed an unreasonable search when they fingerprinted Harrison and Johnson despite the fact that both had already provided their names upon request. It is the City's "burden to demonstrate that the seizure . . . was sufficiently limited in scope and duration." *Florida v Royer*, 460 US 491, 500; 103 S Ct 1319; 75 L Ed 2d 229 (1983). "The scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Terry*, 392 US at 18 (quotation marks omitted). If either the scope of the seizure or its duration is unreasonable, it violates the Fourth Amendment. See, e.g., *United States v Hensley*, 469 US 221, 235-36; 105 S Ct 675; 83 L Ed 2d 604 (1985); *Royer*, 460 US at 504-06.

1. The City Was Not Justified In Taking the P&Ps to Determine the Plaintiffs' Identity.

Terry searches are limited to "that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Terry*, 392 US at 26. "Nothing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons." *Ybarra v Illinois*, 444 US 85, 93–94; 100 S Ct 338; 62 L Ed 2d 238 (1979). Accordingly, absent a lawful arrest or probable cause, the Fourth Amendment

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Supp 1372, 1381 (D Alas, 1994) (determining only that "photographs and fingerprints, alone, *would not likely* constitute a search") (emphasis added).

does not permit officers to perform an evidentiary search as part of a *Terry* stop. See *People v Arterberry*, 431 Mich 381, 385; 429 NW2d 574 (1988) (permitting a search of the defendant because there was probable cause for arrest); *People v Williams*, 63 Mich App 398, 401; 234 NW2d 541 (1975) (holding that even though the officer had reason to believe the suspect was lying when he said he had no identification, the officer's action in looking in the suspect's wallet at a driver's license was an unreasonable search because it did not fit within any category of permissible warrantless search).

While questions regarding identity are a permissible part of many *Terry* stops, there is no requirement that individuals substantiate their identity through any particular means. See *Hiibel v Sixth Judicial Dist Court*, 542 US 177, 186; 124 S Ct 2451; 159 L Ed 2d 292 (2004). Indeed, the government interest in identity does not require that an individual provide any particular form of identification; the individual's name alone is sufficient to determine whether the individual is wanted for another offense or has a record of violence or mental disorder, or to clear the individual of suspicion. See *id.*

Harrison and Johnson were both told that the fingerprinting was necessary to identify them, but neither the photographs nor fingerprints were submitted or processed immediately. Instead, the photographs and prints were only submitted at the end of the officers' shift, and were not actually processed until some indeterminate time after that. LaBrecque Dep 12, 13, Ex 3 to Amicus Curiae's Br; GRPD Manual of Procedures, p 3, Ex 6 to Pl/Appellant Harrison's Br on Appeal; Def's Resp to Johnson's First Set of Interrogatories, ¶¶ 14, 15, Ex 4 to Amicus Curiae's Br. Moreover, obtaining fingerprints during a *Terry* stop is pointless unless the individual's fingerprints are already in a government database. Thus, the assumption that collecting

fingerprints during a *Terry* stop will be useful as a matter of routine to ascertain an individual's identity is inherently unsound.

Harrison's and Johnson's names alone, without further proof of identification, were sufficient to serve the government interests identified in *Hiibel* – based on this information alone, officers could and did determine whether Harrison or Johnson were wanted for another offense or had a record of violence or mental disorder. See 542 US at 186. Because the photographs and fingerprints were not necessary to ascertain Harrison's or Johnson's identity and were not in fact used to do so, the fingerprinting was an unreasonable search.

2. The Photographing and Fingerprinting Was Not Reasonably Related to the Scope of the Stop Because The City Failed to Show That Photographing and Fingerprinting Plaintiffs was "Strictly Tied to or Justified By" the Original Basis for the Stop.

The P&P procedure cannot be used as an investigative technique during *Terry* stops unless it was "strictly tied to or justified by" the original basis for the stop. See *Terry*, 392 US at 18. As discussed above, searches during *Terry* stops are limited to searches for weapons. Searches of suspects are allowed incident to arrest when there is probable cause, but not before. Moreover, assuming that there could be occasions when fingerprinting is permissible without probable cause, which the Supreme Court has never held, fingerprinting would be permissible only "if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch." See *Hayes*, 470 US at 817.

The City failed to show that photographing and fingerprinting Harrison was strictly tied to and justified by the original basis for the stop, or that it was necessary to establish or negate his connection with the crime. The original suspicion that served as the basis for the stop of Harrison was Captain VanderKooi's observation that Harrison handed a toy to another individual

and then went to a secluded area in the park. VanderKooi Dep 13, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). It is undisputed that during the stop, Harrison explained to Captain VanderKooi that he was helping a friend, Pablo Aguilar, carry an internship project and trying to catch or help birds. Harrison Dep 17, App F to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*); VanderKooi Dep 13-14, App G to Def/Appellee's Br on Appeal (*Harrison v VanderKooi)*; Nagtzaam Dep 15, Ex 5 to Amicus Curiae's Br; Newton Dep 11, Ex 6 to Amicus Curiae's Br. Similarly, it is undisputed that Aguilar's story corroborated Harrison's story. Newton Dep 16, Ex 6 to Amicus Curiae's Br. Once Harrison provided an explanation of his behavior and once his explanation was verified, the original suspicion that served as the basis for the stop was dispelled, and it was impermissible to obtain Harrison's fingerprints or photographs for the purpose of any other investigation.

Similarly, the City failed to show that photographing and fingerprinting Johnson was strictly tied to and justified by the original basis for the stop or that it was necessary to establish or negate his connection with the crime. The original suspicion that served as the basis for stopping Johnson was a complaint about trespassing in a parking lot and looking into cars. Bargas Dep 5, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*). During the course of the investigation, however, the officers confirmed that Johnson lived nearby and was using the lot as a shortcut, Def's Resp to Johnson's First Set of Interrogatories ¶ 4, Ex 4 to Amicus Curiae's Br, and that he did not try to enter into or access any of the vehicles in the lot. Bargas Dep 24, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*). Like Harrison, once Johnson provided an explanation and once it was verified, the original suspicion that served as the basis for the stop was dispelled, and it was impermissible to obtain Johnson's fingerprints or photographs for any other purpose.

In both cases, to the extent that the photographs and fingerprints were used to investigate suspicions unrelated to the *original* basis for the stop, they were by definition not necessary to investigate the *original* basis for the stop. Despite the fact that the information obtained from Johnson and witnesses was sufficient to dispel the original suspicion that served as the basis for the stop, Sergeant Bargas claimed that he took photographs of Johnson not only for identification purposes, but also because he considered Johnson a suspect in previous burglaries in the lot. Bargas Dep 24-25, App G to Def/Appellee's Br on Appeal (*Johnson v Bargas*). Similarly, Captain VanderKooi testified that he believed Johnson's fingerprints should be compared to those from earlier larcenies because "[h]e was walking through the [lot] . . . looking into cars." VanderKooi Dep 60, App G to Def/Appellee's Br on Appeal (*Harrison v Vanderkooi*). The police had nothing that connected Johnson to the earlier break-ins, as there were no suspect descriptions from some of the prior larcenies to which Johnson's appearance could be compared, *id.* at 62, and Johnson did not match the description of a "black male that was bald wearing a hood" in two other incidents, *id.* at 12-13. (Notably, there had been no larcenies in the lot for at least one or two months. *Id.* at 61-62.)

None of these steps were necessary to "establish or negate the suspect's connection with *that* crime," *Hayes*, 470 US at 817, and thus additionally shows that taking the fingerprints and photographs was impermissible because doing so was irrelevant to any unanswered suspicion related to the original basis for the stop.

3. The City Failed to Show That Retaining the Photographs and Fingerprints Was "Strictly Tied to or Justified by" the Basis for the Stop.

Finally, the City has set forth no justification for retaining Harrison's and Johnson's photographs and fingerprints in the police department's files. As established above, the photographs and fingerprints were not necessary for identification purposes, and were not

"strictly tied to or justified by" the basis for the stop. See *Terry*, 392 US at 18. These purported justifications are similarly insufficient for *retaining* Harrison's and Johnson's fingerprints and photographs. In spite of this, Johnson's and Harrison's prints and photos, like those of all other people whose information has been collected by the City, will apparently remain on file for as long as the City deems it necessary: "[t]he fingerprints and photos that have already been taken will not be purged from the department's databases at this time. What will happen to them in the long term has not yet been determined."[21]

Maintaining Harrison's and Johnson's photographs and fingerprints on file can serve no purpose other than the investigation of future criminal activity. This causes an ongoing intrusion that is beyond the permissible scope of the stop.

C. Drawing All Inferences in Favor of Harrison, Whether Any Consent was Voluntary is Disputed Because the Totality of the Circumstances Are Disputed.

The trial court erred when it concluded that Harrison's consent was voluntary, and the Court of Appeals erred in not addressing this issue and not reversing the trial court on this point. There are genuine disputes of fact as to whether a reasonable observer would have viewed Harrison's consent as voluntary despite Harrison's mere acquiescence to authority, his personal characteristics including his age, and the evidence of duress.

First, the trial court erred when it concluded that Harrison's "okay" was properly interpreted as consent. Ex 4, p 7. "[T]he constitutional standard for determining the scope of a consent to search "is that of 'objective reasonableness'—what would the typical reasonable person have understood by the exchange between the officer and the suspect." *People v Dagwan*, 269 Mich App 338, 343; 711 NW2d 386, 390 (2005) (citing *Florida v Jimeno*, 500 US 248, 251; 111 S Ct 1801; 114 L Ed 2d 297(1991)). Viewing Harrison's "okay" in the light most favorable

[21] Walker, *supra* n 7.

to the non-moving party, whether a reasonable person would have understood the exchange to indicate consent cannot be answered against him at summary disposition. See, e.g., *Lavigne v Forshee*, 307 Mich App 530, 538; 861 NW2d 635 (2014) (reversing a grant of summary disposition for police officers where the case was "rife with material questions of fact as to whether plaintiffs freely and voluntarily consented to defendants' entry and search of their home.").

The City bears the burden of proving that consent was given and that it was given freely and voluntarily. *People v Chowdhury*, 285 Mich App 509, 524; 775 NW2d 845 (2009) (citing *People v Farrow*, 461 Mich 202, 208; 600 NW2d 634 (1999)). Moreover, "consent must be unequivocal, specific, and freely and intelligently given." *Id.* While there are disputes of fact as to what the police officers said to Harrison to elicit his response of "okay," it is undisputed that Harrison was never explicitly asked to consent. As a result, the City cannot establish that Harrison consented because he was never asked to do so.

Instead, the facts in this case show no more than Harrison's mere acquiescence to lawful authority, which is insufficient to establish consent. See *Chowdhury*, 285 Mich App at 524-26 (citing *Farrow*, 461 Mich at 208) (finding "acquiescence to a claim of lawful authority" insufficient to establish consent where officers did not request the defendant's permission to take a preliminary breath test and told him that he was required to do so). Captain VanderKooi never asked for permission to take Harrison's photograph or fingerprints but told [Harrison that] to identify who [he is] he would have to take [Harrison's] picture" and fingerprints. Harrison Dep 30, 34, App F to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). As a result, all the City can establish on the basis of Harrison's "okay" is acquiescence to lawful authority.

Second, the City failed to establish that Harrison's consent was voluntary given his personal characteristics, particularly his age. In determining whether consent was voluntary, courts must take into account the totality of the circumstances, including the individual's age and level of education, whether the individual was advised of his right to refuse consent, and the length and nature of the questioning. See *Schneckloth v Bustamonte*, 412 US 218, 226, 229; 93 S Ct 2041; 36 L Ed 2d 854 (1973); *People v Conte*, 421 Mich 704, 753; 365 NW2d 648 (1984); *People v Raybon*, 125 Mich App 295, 303; 336 NW2d 782 (1983). With respect to age, the Supreme Court has "[t]ime and time again" "recognized that juveniles are "less mature and responsible than adults,' that they 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,' [and] that they 'are more vulnerable or susceptible to . . . outside pressures' than adults." *JDB v North Carolina*, 564 US 261, 272; 131 S Ct 2394; 180 L Ed 2d 310 (2011) (citations omitted); see also *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005); *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010).

These repeated and "commonsense" conclusions about the developmental differences between juveniles and adults, *JDB*, 564 US at 272-76, are equally applicable in the context of whether consent is voluntary. Because age has a profound impact on a juvenile's ability to understand, exercise, and appreciate his or her right to refuse consent to a search, the trial court should have required the City to establish that Harrison's consent was voluntary in spite of his age. See, e.g., *Jones v Hunt*, 410 F3d 1221, 1226 (CA 10, 2005) (concluding a reasonable sixteen year-old would not have felt free to terminate an encounter with a police officer and social worker); *In re JM*, 619 A2d 497, 503 (DC, 1992) ("[I]t seems to us almost self-evident that a trial judge deciding the issue of consent by a youth must be sensitive to the heightened danger of

coercion in this setting. Correspondingly, our own responsibilities as a reviewing court permit us to require that in such cases the trial judge make explicit findings on the record concerning the effect of age and relative immaturity on the voluntariness of the defendant's consent.").

The City did not and cannot meet this burden. Harrison was 16 years old when his photograph and fingerprints were taken by the police.[22] While the trial court mentioned Harrison's age, the City failed to show, and the trial court failed to actually consider, the impact of Harrison's age in determining whether his consent was voluntary. Instead, the court focused on the lack of any "claim that Plaintiff suffers from any cognitive deficiency or lacked the capacity to consent." Ex 4 at 10. A lack of cognitive deficiency or capacity to consent is beside the point – Harrison's age alone has significant bearing on the voluntariness of any consent.

Under the circumstances, Harrison's age, hampered his ability to understand, appreciate, and exercise his right to decline to consent to a search and made him more likely to be deferential to authority during a stressful situation like being questioned on the basis of suspected activity; this made him especially vulnerable to pressure to consent.

Finally, whether Harrison was under duress during the encounter is disputed. "Consent [to search] is not voluntary if it is the result of coercion or duress." *People v Bolduc*, 263 Mich App 430, 440; 688 NW2d 316 (2004) (citing *People v Borchard–Ruhland*, 460 Mich 278, 294; 597 NW2d 1, 10 (1999)); *Lavigne*, 307 Mich App at 538. Harrison's politeness should not be mistaken for consent. While Captain VanderKooi testified that Harrison had a "very good demeanor and was very courteous," VanderKooi Dep 37, App G to Def-Appellee's Br on Appeal

[22] Captain VanderKooi had information sufficient to establish Harrison's age. Harrison told Captain VanderKooi that he was coming home from school and where he went to school, VanderKooi Dep 13, 22, App G to Def-Appellee's Br on Appeal (*Harrison v VanderKooi*), and Harrison was wearing his high school uniform, including a polo shirt with the school logo, at the time of the stop. Harrison Dep 18, App F to Def-Appellee's Br on Appeal (*Harrison v VanderKooi*).

(*Harrison v VanderKooi*), Harrison testified that the tone of the interaction was "very intense" and that he [f]elt like [he] did something that [he] was not supposed to do." Harrison Dep 21, App F to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). In addition, his voice was "nervous" and "shaky." *Id.* at 30-31. Similarly, while the trial court concluded that Harrison "felt free to ask the officers several questions throughout the course of the stop," Ex 4 at 10, in fact Harrison's nervousness extended throughout the interaction – the tone of his voice remained nervous at the end of the interaction when he thanked the officers after Captain VanderKooi told him he could go. Harrison Dep 40, App F to Def/Appellee's Br on Appeal (*Harrison v VanderKooi*). This is not surprising, as the stop was Harrison's first and only encounter with any law enforcement agency, *id.* at 54-55, and the encounter included three police officers, Nagtzaam Dep 11, Ex 5 to Amicus Curiae's Br, two of whom were in marked patrol cars, LaBrecque Dep 6, Ex 3 to Amicus Curiae's Br; Nagtzaam Dep 8, Ex 5 to Amicus Curiae's Br. Again, when viewing the totality of the circumstances and when examining the facts in the light most favorable to Harrison, the facts are material and disputed.

In sum, because the City failed to meet its burden of establishing that Harrison would have felt free to decline to consent to a search under the circumstances, the grant of summary disposition for the City should be reversed.

CONCLUSION

For the reasons set forth above, Plaintiffs-Appellants respectfully request that this Court grant their application for leave to appeal.

Respectfully submitted,

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Dated: July 5, 2017